ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL

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December 21, 2005

Section 5 Submission

Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20006

Re: Submission Under Section 5 of the Voting Rights Act for:

New Hampshire Revised Statute Annotated ("RSA") 655:19-b, a STATUTE related to waiver of filing fees and primary petitions, most recently amended by Laws of 1991 Chapter 387 and previously amended by the chapters cited below.

Dear Voting Section Chief:

Pursuant to 42 U.S.C. § 1973 (c), the State of New Hampshire, through the Office of the New Hampshire Attorney General, hereby submits RSA 655:19-b, a STATUTE related to waiver of filing fees and primary petitions, most recently amended by Laws of 1991 Chapter 387 and previously amended by the chapters cited below. As a result of a decision by the Federal District Court for New Hampshire, the State is not currently executing this statute, however, the legislature has not chosen to repeal the statute and preclearance is sought to resolve the historical failure to preclear immediately after adoption. *Kennedy v. Gardner,* No. 96-574-B (D. N.H., June 5, 1998) (Barbadoro, C.J.).

SUBMISSION:

In accordance with 28 C.F.R. § 51.27, the submission is as follows:

a) Chapter 387 (1991) amending RSA 655:19-b is attached (Exhibit 655:19-b A). Chapter 212 (1989) enacting RSA 655:19-b is attached (Exhibit 655:19-b B).

b) Chapter 212 (1989) enacted RSA 655:19-b for the first time, therefore, there is no prior statute that is being amended.

c) The changes made by amendments to RSA 655:19-b are as follows:

1. Chapter 387 (1991) makes the following changes:

a. Inserts the phrase "*...and Primary Petitions...*" into the statute catchline.

b. Insert the phrase "*...under RSA 655:19...*" into paragraph I following the words "*filing fee.*"

c. Insert the phrase "*...and shall have the requirement for filing petitions under RSA 655:20 waived...*" following the word "*refunded*" in paragraph I.

d. Insert the phrase "*...or declaration of intent...*" in paragraph II following the word "*candidacy.*"

e. Insert the phrase "*...required under RSA 655:19 and the petitions required to be filed under RSA 655:20...*" following the word "*fee*" in paragraph II.

f. Replace the number "*10*" with "*3*" in paragraph II.

2. Chapter 212 (1989) enacts RSA 655:19-b.

d) This submission is made by: Senior Assistant Attorney General Orville B. Fitch II, 33 Capitol Street, Concord, New Hampshire 03301, Phone: (603) 271-1238.

e) The submitting authority is New Hampshire Attorney General, Kelly A. Ayotte for the State of New Hampshire.

f) Not applicable.

g) The changes for which pre-clearance is sought were made by a decision of the New Hampshire General Court (Legislature).

h) In accordance with Amendment X of the U.S. Constitution, the New Hampshire General Court, the State's Legislature, acting pursuant to the New Hampshire Constitution Part Second, Article 2, granting supreme legislative power within the state to the House and Senate, who with right to negate each other are granted power to make law through Part

Second, Article 5. Additional authority regarding election law is vested in Part First, Article 11.

The Legislature through a bicameral process passed law to create Chapter 387 (Exhibit 655:19-b A). The bill was signed into law (by the Governor) on July 2, 1991, pursuant to New Hampshire Constitution Part Second, Article 44.

i) Adoption dates:

1. Chapter 387 (1991) adopted July 2, 1991.

2. Chapter 212 (1989) adopted May 22, 1989.

j) Effective dates:

1. Chapter 387 (1991) effective July 2, 1991.

2. Chapter 212 (1989) effective January 1, 1990.

k) The changes have been enforced.

l) The changes affect the entire State of New Hampshire.

m) The purpose for the changes are as follows:

1. The purpose of the Chapter 387 (1991) changes are as follows:

   a. Include primary petitions and declarations of intent within the scope of this statute's waiver provisions as times when a candidate may apply for waivers of fees.

   b. Include the RSA 655:20 petition requirements within the scope of this statute's provisions as something that may be waived by accepting the requirements of RSA 664:5-a.

2. The purpose of Chapter 212 (1989) is to enact RSA 655:19-b, a statute waiving filing fees for candidates who agree to voluntary limits on campaign expenditures.

n) These changes do not negatively target any protected class under section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973 (c). They are expected to have neutral impact and do not meet the test of retrogression defined in *Reno v. Bossier Parish Sch. Bd*, 520 U.S. 471, 478 (1997). "(T)he ability of minority groups … to elect their choices to office" will not be diminished. *Beer v. U.S.*, 425 U.S. 130, 141 (1976).

o) Enforcement of RSA 655:19-b was blocked by an order of the Court in *Kennedy v. Gardner*, No. 96-574-B (D. N.H., June 5 1998) (Barbadoro, C. J.). The Court found that "the added burdens imposed on candidates who chose not to adhere to the campaign expenditure limits were impermissibly coercive and insufficiently related to the goal sought to be achieved by the statutory scheme -- encouraging candidates to agree to limit campaign expenditures." 1999 WL 814273 (D.N.H.) at *5. The basis of the court's decision is unrelated having a retrogressive effect on a protected class. Since that order was issued, the Legislature has chosen not to repeal the statute, therefore, preclearance is nonetheless sought to clear this statute from the list of statutes that were not timely precleared. The Court Order and a related Opinion of the Attorney General are attached as Exhibit 655:19-b D.

p) RSA 655:19-b has never been precleared. This submission seeks preclearance of Chapter 387 (1991) and all previous changes.

q) Not applicable as this is not a redistricting plan.

r) Exhibit 655:19-b C is a copy of a Press Release of this submission, its availability, and inviting comment to federal Department of Justice.

I expect the foregoing information is sufficient to enable the United States Attorney General to make the required determination pursuant to Section 5 of the Voting Rights Act. If further information is required or would be helpful, please contact me.

Very truly yours,

Orville B. Fitch II
Senior Assistant Attorney General
Civil Bureau
(603) 271-1238
bud.fitch@doj.nh.gov

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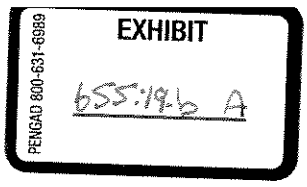

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Enrolled Bill Amendment

1991 SESSION

SENATE BILL NO. 195-FN (CHAPTER 387, LAWS OF 1991)

INTRODUCED BY: Sen. Bass of Dist. 11

REFERRED TO: Public Affairs

AN ACT relative to campaign expenditure limitations.

AMENDED ANALYSIS

This bill amends the law on campaign expenditure limitations.

The bill makes it apply to candidates who intend to have their names placed on the state general election ballot by means of primary petitions or nominating petitions. The current law only applies to candidates who are nominated in their party primary, and to write-in candidates.

The bill also:

(1) Changes the membership on the advisory committee which monitors campaign financing statutes.

(2) Requires a candidate who does not voluntarily accept expenditure limitations to pay both a filing fee and to file primary petitions.

(3) Establishes minimum filing fee and primary petition requirements, regardless of whether a candidate voluntarily accepts expenditure limitations.

(4) Adds new definitions for "expenditures" and "independent expenditures."

(5) Limits the independent expenditures which a political committee may make to support or oppose candidates.

(6) Adds new penalty provisions for violation of RSA 664.

- -

EXPLANATION: Matter added appears in **bold italics.**

Matter removed appears in [brackets].

Matter which is repealed and reenacted or all new appears in regular type.

0641L

91-0531

10

Enrolled Bill Amendment

SB 195-FN

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand

nine hundred and ninety-one

AN ACT

relative to campaign expenditure limitations.

Be it Enacted by the Senate and House of Represen-

tatives in General Court convened:

1 Declaration of Purpose. Amend 1989, 212:1, IV to read as follows:

IV. Unimpeded access to the ballot is crucial to the realization of the constitutional guarantee of a representative form of government. The philosophical basis for democracy is the equal opportunity to participate. Greater participation increases effective representation, preserving the political power guaranteed to the people by the constitution. Expenditure limitations will allow greater ballot access, freer competition of ideas through individual speech and interaction, and more competitive campaigns. Voluntary compliance with expenditure limitations will help provide greater

ballot access, which by its nature is necessary to and a part of the election process. **In further recognition of the state's traditional role in regulating ballot access and candidate qualifications, the general court finds that these objectives can be accomplished by the voluntary procedure set forth herein.** The general court finds that these objectives can be accomplished by campaign expenditure limitations.

2 Filing Declaration of Intent with Secretary of State. Amend RSA 655:14-a to read as follows:

655:14-a Filing by Other Candidates. Every candidate for state or federal office who intends to have his name placed on the ballot for the state general election by means other than nomination

by party primary shall file a declaration of intent with the [appropriate official] **secretary of state** as provided in RSA 655:17-a or RSA 655:17-b during the same time period in which party candidates file a declaration under RSA 655:14.

3 Filing Fees for all Candidates. RSA 655:19 is repealed and reenacted to read as follows:

655:19 Filing Fees.

I. At the time of filing declarations of candidacy, each candidate for the following offices shall pay to the official with whom the declarations are filed the following filing fees, and shall file with the appropriate official the requisite number of primary petitions as provided in RSA 655:20 and 655:22, unless the candidate agrees to limit his expenditures in accordance with RSA 664:5-a. At the time of filing declarations of intent, each candidate for the following offices shall pay to the secretary of state the following filing fees, and the following

filing fees shall be paid in addition to the requisite number of nomination papers which must be submitted and filed. The filing fee paid under this section shall be in addition to the administrative assessment paid under RSA 655:19-c. The filing fees shall be as follows:

(a) For governor, United States senator, and representative to Congress, $5,000.

(b) For executive councilor, $500.

(c) For county officer, $100.

(d) For state senator, $100.

(e) For state representative, $25.

II. The fees paid to a town or city clerk by candidates for state representative shall be forwarded to the treasurer of the town or city and shall be for the use of the town or city. The fees paid to the secretary of state shall be deposited by him in the general fund.

4 Reference to Filing Declaration of Intent. Amend RSA 655:19-b to read as follows:

655:19-b Waiver of Filing Fee **and Primary Petitions**.

I. A candidate for any of the offices enumerated in RSA 655:19 who, pursuant to RSA 664:5-a, voluntarily accepts the expenditure limitation set forth in RSA 664:5-b shall have the filing fee **under RSA 655:19** either waived or refunded, **and shall have the requirement for filing petitions under RSA 655:20 waived,** as provided in paragraph II.

II. If a candidate files the affidavit as specified in RSA 664:5-a at the time he files the declaration of candidacy **or declaration of intent**, the filing fee **required under RSA 655:19 and the petitions required to be filed under RSA 655:20** shall be waived. If such

affidavit is filed within [10] **3** days following the filing of the declaration of candidacy, the appropriate officer shall refund the filing fee paid by the candidate as soon as practicable.

5 New Section; Administrative Assessment and Primary Petitions. Amend RSA 655 by inserting

211:2 New Section; Additions to Capacity. Amend RSA 362-A by inserting after section 4 the following new section:

362-A:4-a Additions to Capacity of Small Power Production Facilities. Any qualifying small power production facility already subject to rates established by order of the commission may increase its capacity and energy or energy, provided it continues to be a small power production facility. Any capacity additions and the associated energy additions or the energy additions to such qualifying small power production facility shall be purchased in accordance with applicable law and may be purchased under a contract. Such capacity addition and associated energy additions or energy additions shall not be purchased under the rates established by existing orders of the commission. Such rates and orders shall otherwise remain applicable to the qualifying small power production facility.

211:3 Effective Date. This act shall take effect 60 days after its passage.

[Approved May 22, 1989.]
[Effective Date July 21, 1989.]

CHAPTER 212 (SB 178)

AN ACT RELATIVE TO CAMPAIGN FINANCING.

Be it Enacted by the Senate and House of Representatives in General Court convened:

212:1 Declaration of Purpose. In amending the New Hampshire political expenditures and contributions law, RSA 664, the general court finds:

I. Campaign expenditures for state executive and legislative offices have steadily increased over time. As a result, a greater proportion of a candidate's campaign time is spent raising money; personal wealth becomes more important in running a competitive campaign; and mass media marketing and advertising techniques overshadow direct voter contact and the free exchange of ideas between voters and candidates.

II. This legislation is designed to protect the right of the citizens of New Hampshire to a fully representative, responsive form of self-government. The legislature finds that spiraling campaign expenditures prevent the free implementation of such a right by discouraging persons from seeking office, by discouraging individual interaction between candidates and voters, thus reducing individual participation in the political process, and by making it harder for a candidate to run a competitive campaign.

III. The state has a compelling interest in encouraging potential candidates to run for office and in having those races be competitive to ensure greater and more effective representation of the people of the state of New Hampshire. Reasonable political campaign budgets allow a candidate to spend thousands of hours meeting with individuals rather than thousands of hours meeting the ever increasing demand for campaign funding. A candidate who meets with individuals learns firsthand the view of his or her community. The candidate must constantly test his or her views and ideas against differing points of view and new ideas. This interaction often leads the candidate to someone ready to challenge what may have been considered a well-reasoned position.

IV. Unimpeded access to the ballot is crucial to the realization of the constitutional guarantee of a representative form of government. The philosophical basis for democracy is the equal opportunity to participate. Greater participation increases effective representation, preserving the political power guaranteed to the people by the constitution. Expenditure limitations will allow greater ballot ac-

cess, freer competition of ideas through individual speech and interaction, and more competitive campaigns. Voluntary compliance with expenditure limitations will help provide greater ballot access, which by its nature is necessary to and a part of the election process. The general court finds that these objectives can be accomplished by campaign expenditure limitations.

V. The seriousness of the peril to this crucial right affecting the underpinnings of state government and the failure of other less stringent means of reform compel the general court to conclude that reasonable expenditure limitations can restore New Hampshire to the electoral process of self-government contemplated by the constitution.

VI. The state also recognizes that candidates for the United States Senate and United States House of Representatives may face changes in federal law concerning campaign financing, which may necessitate changes in New Hampshire's campaign financing statutes.

212:2 Increasing Filing Fees. RSA 655:19 is repealed and reenacted to read as follows:

655:19 Filing Fees. At the time of filing declarations of candidacy, each candidate for the following offices shall pay to the official with whom the declarations are filed the following filing fees:

I. For the offices of governor, United States senator, and representative to Congress, $5,000.

II. For the office of executive councilor, $500.

III. For the office of state senator, $100.

IV. For the county offices, $100.

V. For the office of state representative, $25.

212:3 Waiving Filing Fee. Amend RSA 655 by inserting after section 19-a the following new section:

655:19-b Waiver of Filing Fee.

I. A candidate for any of the offices enumerated in RSA 655:19 who, pursuant to RSA 664:5-a, voluntarily accepts the expenditure limitation set forth in RSA 664:5-b shall have the filing fee either waived or refunded, as provided in paragraph II.

II. If a candidate files the affidavit as specified in RSA 664:5-a at the time he files the declaration of candidacy, the filing fee shall be waived. If such affidavit is filed within 10 days following the filing of the declaration of candidacy, the appropriate officer shall refund the filing fee paid by the candidate as soon as practicable.

212:4 Filing Primary Petitions. RSA 655:20 is repealed and reenacted to read as follows:

655:20 Primary Petitions. Primary petitions shall be filed as follows:

I. Any person otherwise qualified to run for office who is unable to pay the filing fee as prescribed in RSA 655:19 by reason of indigency may have his name printed on the primary ballot of any party by filing with the appropriate official the requisite number of primary petitions made by members of the party, together with one written assent to candidacy.

II. Any person qualified to run for office who does not, pursuant to RSA 664:5-a, voluntarily accept the expenditure limitations set forth in RSA 664:5-b shall, in order to have his name printed on the primary ballot of any party, in addition to the filing fees prescribed in RSA 655:19, file with the appropriate official the requisite number of primary petitions made by members of the party, together with one written assent to candidacy.

(d) Candidates for state senate:
under $100 - one percent
$100 - $500 - 5 percent
$500 - $1,000 - 10 percent
over $1,000 - 50 percent
(e) Candidates for the general court:
under $100 - one percent
$100 - $250 - one percent
over $250 - one percent

II. Any fine assessed under the provision of this section shall be paid to the secretary of state for deposit into the general fund.

III. Nothing herein shall be construed to limit the power of the attorney general to issue a cease and desist order under RSA 664:18.

212:10 Effective Date. This act shall take effect January 1, 1990.

[Approved May 22, 1989.]
[Effective Date January 1, 1990.]

CHAPTER 213 (SB 146)

AN ACT RELATIVE TO JUDICIAL SALARIES.

Be it Enacted by the Senate and House of Representatives in General Court convened:

213:1 Judicial Salaries. Amend RSA 491-A:1 to read as follows:

491-A:1 Salaries Established. The salaries for the positions set forth below shall be as follows:

Chief justice, supreme court	$82,500
Associate justices, supreme court	80,000
Chief justice, superior court	80,000
Associate justices, superior court	75,000
District court justices prohibited from practice pursuant to RSA 502-A:21	75,000
Probate judges prohibited from practice pursuant to RSA 547:2-a	75,000

213:2 Effective Date. This act shall take effect July 1, 1989.

[Approved May 22, 1989.]
[Effective Date July 1, 1989.]

CHAPTER 214 (SB 18)

AN ACT RELATIVE TO FOREST AND BRUSH FIRES AND ENFORCEMENT POWERS OF THE DIVISION OF FORESTS AND LANDS.

Be it Enacted by the Senate and House of Representatives in General Court convened:

214:1 New Section; Cease and Desist Orders. Amend RSA 224 by inserting after section 1-b the following new section:

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DEPUTY ATTORNEY GENERAL

News Release

RELEASED BY: Attorney General Kelly A. Ayotte

SUBJECT: Voting Rights Act – Submission of a request for preclearance of changes to New Hampshire Voting laws and procedures

DATE: June 10, 2005

RELEASE TIME: Immediate

Attorney General Kelly A. Ayotte announces the submission of requests for preclearance of changes made to the election laws in New Hampshire to the Federal Department of Justice. Preclearance submissions will address changes made to New Hampshire's election laws since jurisdictions in the State became subject to preclearance.

Ten New Hampshire towns are subject to section 5 of the federal Voting Rights Act. Changes to New Hampshire election laws that affect any of these ten towns must be submitted for review by either the Federal Department of Justice or the Federal District Court for Washington D.C. The federal Department of Justice will review the changes to New Hampshire's election laws to ensure that the changes do not have the effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group. Changes to New Hampshire redistricting statutes have been submitted to, and approved by, the U.S. Justice Department since the 1980 census. Federal regulations require that the public be notified that the State has filed a request for preclearance and that the submission be available for public inspection.

Copies of each submission by the Attorney General for the State of New Hampshire are available at the office of the Attorney General at 33 Capitol Street, Concord New Hampshire, 03301. Each document will also be made available at the Attorney General's Office web site at:

http://www.doj.nh.gov/elections/

Attorney General Ayotte and the federal Department of Justice invite persons interested in this submission to submit comments and information, in writing or by telephone, to the Voting Section of the Federal Department of Justice, Civil Rights Division, at the earliest possible date to ensure that they may be considered during the preclearance review time period. Telephone 1-800-253-3931 or (202) 307-2385 or write Chief, Voting Section, Civil Rights Division, Room 7354 – NWB, Department of Justice, 950 Pennsylvania Ave., NW, Washington, DC 20530. The envelope and first page should be marked "Comment under section 5." Additional information on the Voting Rights Act and the preclearance process can be obtained at the web site of the Federal Department of Justice at:

http://www.usdoj.gov/crt/voting/index.htm

The New Hampshire Attorney General's Office Voting section can be contacted at:

http://www.doj.nh.gov/elections/
New Hampshire Toll Free 1-866-8868-3703
or 1-866-VOTER03
electionlaw@doj.nh.gov

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Richard E. Kennedy

v. C-96-574-B

William M. Gardner, et al.

MEMORANDUM AND ORDER

A candidate for state or federal office who is unwilling to abide by New Hampshire's self-described "voluntary" campaign expenditure laws must file a specified number of primary petitions and pay a filing fee when declaring his or her candidacy. N.H. Rev. Stat. Ann. §§ 655:19, 655:20, & 655:22 (1996). The primary petitions must include language informing signatories that the candidate may not have agreed to abide by the state's campaign spending cap. N.H. Rev. Stat. Ann. § 655:20(II). Candidates who agree to limit their expenditures are not subject to these requirements. N.H. Rev. Stat. Ann. § 655:19-b (1996).[1]

Richard Kennedy, a candidate for the New Hampshire House of Representatives who will not agree to limit his expenditures, has

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[1] I refer to these laws collectively as the "spending cap laws."

sued the officials responsible for administering the state's spending cap laws, contending that those laws violate his rights under the First and Fourteenth Amendments to the United States Constitution. Kennedy filed a motion on May 21, 1998, seeking to preliminarily enjoin the defendants from enforcing the spending cap laws against him.[2] Such relief is necessary now, he claims, because the filing deadline for candidates who wish to appear on the primary ballot is June 12, 1998.[3] For the reasons discussed below, I grant Kennedy's motion.

I. THE PRELIMINARY INJUNCTION STANDARD

I ordinarily must consider four factors in determining

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[2] Kennedy originally sought only a temporary restraining order. He later orally amended his motion, however, to also seek preliminary injunctive relief.

[3] Defendants have informed the court that the New Hampshire Legislature repealed the petition and filing fee requirements on June 4, 1998, insofar as they apply to candidates for state office. Although defendants have informed the court that the Governor intends to sign the repeal legislation, she apparently has not yet done so.

The repeal of an unconstitutional statute does not necessarily moot a challenge to the statute's validity. See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). Declaring the issue potentially moot is inappropriate here because the filing period has already begun and Kennedy should not have to further delay the declaration of his candidacy while he awaits the enactment of the repeal legislation.

whether to grant a request for a preliminary injunction: "(1) the likelihood of the movant's success on the merits; (2) the potential for irreparable harm to the movant; (3) a balancing of the relevant equities, i.e., the hardship to the nonmovant if the injunction issues as contrasted with the hardship to the movant if the interim relief is withheld; and (4) the effect on the public interest of a grant or denial of the injunction." DeNovellis v. Shalala, 135 F.3d 58, 62 (1st Cir. 1998). In this case, however, I need only consider Kennedy's likelihood of success on the merits of his claim as defendants concede that he has satisfied the other requirements for preliminary injunctive relief.

II. ANALYSIS

Kennedy argues that the state's spending cap laws impermissibly burden his First Amendment right to promote his candidacy. In effect, he claims that these laws impose an unconstitutional condition on his unfettered right to access the ballot by penalizing him unless he agrees to limit his right to spend on behalf of his campaign. Defendants respond by contending that the spending cap laws do not impair Kennedy's

right to spend because the cap is voluntary. As I explain below, Kennedy's right to relief depends upon whether the spending cap laws are unduly coercive and whether the condition they seek to impose -- an agreement to limit campaign spending -- bears some reasonable relationship to Kennedy's right to have access to the ballot.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court ruled that the government cannot impose a ceiling on the amount that a candidate may spend on his or her campaign. 424 U.S. 1, 19, 58-59 & n.67 (1976). In the words of the Court's per curiam opinion:

> The First Amendment denies government the power to determine that spending . . . [on a political campaign] is wasteful, excessive, or unwise. In the free society ordained by our Constitution[,] it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57. At the same time, the Court recognized that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." Id. at 57 n.65. The Court's opinion thus recognizes that in some

circumstances the government may condition access to a benefit on the relinquishment of a constitutional right. Other cases support this view. See, e.g., Rust v. Sullivan, 500 U.S. 173, 192-94 (1991) (government may deny public health funding to organizations that engage in abortion counseling even though such counseling is protected by the First Amendment); Lyng v. International Union, UAW, 485 U.S. 360, 364-66, 369 (1988) (government may deny food stamps to otherwise eligible families because a family member has gone on strike); Wyman v. James, 400 U.S. 309, 324 (1971) (government may condition receipt of AFDC benefits on a recipient's agreement to consent to a warrantless search).

The government's power to impose conditions on the receipt of government benefits, however, is not without limitation. The Supreme Court has held, for example, that the government may not condition a tax exemption for veterans on an agreement to take a loyalty oath, Speiser v. Randall, 357 U.S. 513, 529 (1958); terminate a government employee for exercising First Amendment rights, Perry v. Sindermann, 408 U.S. 593, 597 (1972); or condition the provision of public broadcasting funds on the relinquishment of the right to editorialize, FCC v. League of

Women Voters, 468 U.S. 364, 402 (1984). What distinguishes these decisions from Buckley and other cases upholding conditions on the receipt of government benefits is the coercive means used by the government in these cases to induce the plaintiffs to abandon their constitutional rights. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1433-42 (1989) (discussing cases).

The Supreme Court also tests the legitimacy of conditions placed on the receipt of government benefits by asking whether a condition is germane to the benefit being conferred. See id. at 1462-68. Perhaps the clearest example is presented by the Court's opinion in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). There, the Court considered a state agency decision that conditioned the approval of a beach-house construction permit on the plaintiff granting an easement allowing the public to walk along his beach. Id. at 828. The agency conceded that its only legitimate interest in regulating the construction of beach houses was to preserve open views of the ocean from the road. Id. at 835-36. Even though the Court acknowledged that the state had the greater power to prevent the plaintiff from building the beach house, it invalidated the agency's arguably

less-intrusive beach-access condition because the condition -- allowing the public to walk along the plaintiff's beach -- was not reasonably related to the state's interest in preserving ocean views from the road.[4] Id. at 838-39; see also Dolan v. City of Tigard, 512 U.S. 374, 394-95 (1994) (invalidating as unconstitutional a development condition that landowner dedicate portion of property lying in floodway for public bicycle path because condition lacked reasonable relationship to the state's interest in regulating the proposed development); Maher v. Roe, 432 U.S. 464, 475 n.8 (1977) (although government may deny funding for abortions, a regulation denying general welfare benefits to women who had had abortions and would otherwise be entitled to benefits would be subject to strict scrutiny). Thus, as Nollan recognizes, a condition on the receipt of a government

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[4] In invalidating the agency decision, the Court analogized the situation to one wherein the state banned shouting "fire" in a crowded theater but granted dispensation to those willing to contribute $100 to the state treasury. Nollan, 483 U.S. at 837. "[A] ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet our stringent standards for regulation of speech . . . ." Id. "[A]dding the unrelated condition," however, alters the purpose of the ban to one aimed at raising tax revenue, "which [even if] legitimate, is inadequate[ly related to the condition] to sustain the ban." Id. That the state has a legitimate interest is of no avail where the condition serves an entirely different, unrelated purpose. Id.

benefit will be deemed unconstitutional unless some reasonable relationship exists between the condition and the benefit being conferred.

The First Circuit Court of Appeals addressed the doctrine of unconstitutional conditions in the context of a campaign spending cap law in Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993). At issue was a Rhode Island law that in exchange for a gubernatorial candidate's agreement to abide by an overall spending cap, offered the candidate public financing, free television time, and the ability to solicit larger individual campaign contributions than could candidates who did not agree to the spending cap. Id. at 29-30. In upholding the law against a First Amendment challenge, the court concluded that the Rhode Island law was not coercive, but instead offered candidates a true choice "among differing packages of benefits and regulatory requirements." Id. at 39. In other words, the court determined that the Rhode Island law did not violate the First Amendment because it gave candidates a choice between retaining the right to raise and spend an unlimited amount of money subject only to valid contribution limitations, and limiting that right in exchange for a package of benefits to which the candidate would

not otherwise be entitled.[5]

New Hampshire's spending cap laws differ from the statutory schemes at issue in Buckley and Vote Choice both because the state has chosen a coercive means to achieve adherence to its spending cap and because the condition those laws impose on gaining access to the ballot -- limiting the constitutional right to make campaign expenditures -- bears no reasonable relationship to any legitimate reason for controlling ballot access.

Rather than choosing to encourage compliance with a spending cap by providing incentives such as public financing or free television time, New Hampshire has opted to penalize non-complying candidates by making it more difficult for them to gain access to the ballot. The state's choice of methods is important to Kennedy's constitutional claim because unlike benefits such as public financing, to which no candidate has a constitutional entitlement, both candidates and the voters they seek to serve have a constitutionally-protected interest in ensuring that

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[5] The court did not consider whether the spending limitation condition was germane to the benefits being conferred. The germaneness requirement would easily have been satisfied in Vote Choice, however, as the package of benefits Rhode Island offered to candidates who agreed to limit spending were all directly related to the issue of campaign spending.

candidates are not unreasonably denied access to the ballot. Anderson v. Celebrezze, 460 U.S. 780, 787-88 (1983); Buckley, 424 U.S. at 94. Accordingly, as the Court recognized in Buckley, laws that restrict ballot access are inherently more coercive than laws conditioning access to other benefits such as public financing. 424 U.S. at 94 & n.128, 95.

Defendants argue that the spending cap laws cannot be considered coercive because candidates for the office of state representative who are unwilling to abide by the cap need only file ten nominating petitions and pay a $25.00 filing fee in order to gain access to the ballot. See N.H. Rev. Stat. Ann. §§ 655:19(I)(e) & 655:22. I disagree. Although it is unlikely that any serious candidate would be deterred by these requirements, the petition and filing fee requirements undeniably are targeted only at those candidates who are unwilling to limit their constitutional right to spend in support of their campaigns. Under these circumstances, it is not the magnitude of the penalty, but rather the fact that the state has attempted to punish candidates who will not abandon their constitutional rights that makes the spending cap requirements coercive. See, e.g., Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422,

1426 (8th Cir. 1995) (law preventing candidates who will not agree to limit expenditures from accepting contributions from political action committees and requiring such candidates to file daily disclosure reports is impermissibly coercive).[6]

New Hampshire's spending cap laws are also improper because the condition the laws seek to impose bears no reasonable relationship to the advantage they give to candidates who agree to limit their spending. States have a legitimate interest in regulating access to the ballot to reduce voter confusion and eliminate frivolous candidates. See, e.g. American Party of Texas v. White, 415 U.S. 767, 781 (1974); Storer v. Brown, 415 U.S. 724, 732-33 (1974). Defendants do not allege, however, that New Hampshire's ballot access restrictions serve either purpose. Further, while the declaration of purpose that accompanied the spending cap legislation suggests that the legislation's restrictions are justifiable because they will somehow broaden

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[6] To illustrate the point, assume that New Hampshire attempted to impose a one cent tax on every one hundred dollars a candidate chose to spend above a designated cap. Although the penalty imposed would not be severe, such a tax, without question, would be coercive and in violation of the candidate's First Amendment right to promote his candidacy. Accordingly, it is not the magnitude of the penalty but the fact that it is imposed to burden the exercise of a constitutional right that renders a condition impermissibly coercive.

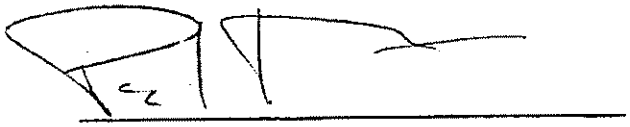
access to the ballot, see 1991 N.H. Laws 387:1, it is difficult to see how this could be so. Certainly, the spending cap laws might entice some people to run for office who would not otherwise become candidates. At the same time, however, the laws might drive away potential candidates who are unwilling to cede their constitutional right to spend on behalf of their campaigns. In any event, the imposition of ballot access restrictions on noncomplying candidates do not make it easier for complying candidates to gain access to the ballot. Accordingly, the spending cap laws are unlikely to survive Kennedy's First Amendment claim because they do not bear a reasonable relationship to any legitimate reason for regulating ballot access.

III. CONCLUSION

In summary, the state remains free to offer candidates a "choice among different packages of benefits and regulatory requirements" in order to encourage compliance with the state's spending cap. Vote Choice, 4 F.3d at 39. The state may not, however, coerce compliance by attempting to penalize candidates who will not comply voluntarily. Nor may it impose conditions on

gaining access to the ballot that bear no reasonable relationship to any legitimate reason for regulating ballot access. As it appears that New Hampshire's spending cap laws fail to meet these standards, I find Kennedy is likely to succeed on the merits of his claim that the laws are unconstitutional. As the other prerequisites to the issuance of a preliminary injunction are not in dispute, I grant Kennedy's motion. Accordingly, defendants are preliminarily enjoined from requiring Kennedy to file the primary petitions required by N.H. Rev. Stat. Ann. §§ 655:20(II) and 655:22 and pay the filing fee required by N.H. Rev. Stat. Ann. § 655:19(I)(e).

SO ORDERED.



Paul Barbadoro
Chief Judge

June 5, 1998

cc: Philip T. Cobbin, Esq.
William C. Knowles, Esq.
Wynn E. Arnold, Esq.

New Hampshire
Department of Justice

June 11, 1998

Honorable William M. Gardner

Secretary of State

State House

107 North Main Street

Concord, New Hampshire 03301

Re: Kennedy v. Gardner

Dear Secretary Gardner:

As you know, the United States District Court issued an order on Friday in the Kennedy v. Gardner lawsuit, in which the Court expressed its opinion that the additional petition and fee requirements for candidates who do not agree to the State's voluntary spending limits is unconstitutional. Because the court found that these requirements are unlikely to survive a First Amendment claim, the Court granted a preliminary injunction.

Of particular relevance is the following language from the opinion:

New Hampshire's spending cap laws differ from the statutory schemes at issue in Buckley and Vote Choice both because the state has chosen coercive means to achieve adherence to its spending cap and because the condition those laws impose on gaining access to the ballot -- limiting the constitutional right to make campaign expenditures -- bears no reasonable relationship to any legitimate reason for controlling ballot access.

Rather than choosing to encourage compliance with a spending cap by providing incentives such as public financing or free television time, New Hampshire has opted to penalize non-complying candidates by making it more difficult for them to gain access to the ballot.

The Court rejected any claim that the petition and fee requirements served a legitimate purpose other than coercion of candidates' agreement to the "voluntary" limits. Therefore, in the Court's opinion, these requirements are unconstitutional.

We find no grounds to appeal this decision. Had the case not been mooted by legislation signed on Friday, we do not think that we could have avoided the imposition of a permanent injunction and significant fees in the Kennedy case.

We can find no fault with the approach taken to this case by Judge Barbadoro, and we feel that his legal reasoning will be followed by the United States District Court and the First Circuit Court of Appeals in any future case. For this reason, we do not feel that we can, in the future defend the additional petition and fee requirements for candidates who do not agree to the voluntary spending limits. While the law which was enacted on Friday repeals the requirement for state candidates, the reasoning of Judge Barbadoro's opinion applies with equal, if not superior, force to federal candidates as well.

The petition and fee requirements were a New Hampshire innovation and an effective one. Despite your best efforts and ours, however, the petition and fee requirements are no longer enforceable.

Nevertheless, not all of the voluntary expenditure limit law has been struck down. Candidates can still agree voluntarily to abide by the State's campaign spending law. In doing so, they promise the people of the State that they will limit their spending and all spending on their behalf; that they will cooperate with this office in our review of their compliance; and that they will pay appropriate fines if they overspend. Candidates agreeing to the cap, in other words, promise to play by a set of rules which are set forth in Chapter 664 and which have developed over the years through the actions of your office and mine.

In ensuring that they live up to this promise, we must rely on the good faith of the candidates and on the strength of public opinion. This is true to a great extent with respect to state candidates, and almost entirely with respect to federal candidates. For the State candidates, the law gives this office a number of coercive enforcement tools. As I have stated in connection with another matter, federal law makes coercive enforcement against federal candidates who voluntarily agree to the limits impossible.

In the future, those who file their declarations of candidacy may be required to indicate whether or not they agree to the State's voluntary expenditure limits. However, if they choose not to agree to the limits, they need not file additional petitions or pay additional fees.

In light of the advice we have given in this letter, there may be candidates who wish to amend their declarations. Because the legislation and the order came after the filing period opened, candidates who have already filed should be given the opportunity to amend their declarations of candidacy prior to the close of the filing period tomorrow.

Sincerely,

Philip T. McLaughlin

Attorney General

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